

9th Update Issue#16: Summary of Previously Conforming Regulations

The City of San Diego takes a unique approach to address the operation of, and maintenance, repair, alteration, replacement, and expansion of (previously conforming) development that was legally established in compliance with applicable regulations at the time of development, but that no longer complies due to a change in zoning regulations. Currently, previously conforming situations are dealt with in a variety of ways where some development improvements are allowed by right, some require discretionary review, and others are not permitted at all. The City's regulations are in need of clarification with the 9th Update due to the potential for multiple interpretations in certain circumstances counter to the intent. There are also opportunities to provide greater predictability and certainty in the regulations, particularly for property owners who need to rebuild following a disaster.

The proposed changes are intended to:

- Facilitate consistent application of the regulations and a more predictable outcome for applicants and the community.
- Increase certainty and predictability for the reconstruction of development following a fire, natural disaster, or act of public enemy.
- Increase opportunities and the likelihood for reinvestment in the City's older neighborhoods.
- Increase certainty and predictability for communities undergoing land use plan/zoning updates.
- Clarify the regulations applicable to previously conforming fast food restaurants with a drive-through component, and establish an amortization period for previously conforming hours of operation past midnight in locations adjacent to residential.
- Clarify the regulations applicable to proposed expansion of separately regulated industrial uses.

What does "previously conforming" mean?

- Applies to structures that were legally built, or uses that were legally established, in compliance with applicable regulations at the time of development.
- Structures and uses become "previously conforming" when changes in zoning cause the structure or use to no longer comply.
- The property owner has the burden to demonstrate that the structure or use has previously conforming rights.
- Previously conforming rights do not apply to situations where structures and uses were not established legally.

Background

- The existing regulation has been in effect since January 1, 2000. It sets the review process for development, maintenance, and operation of previously conforming premises and uses.
- The purpose and intent is:
 - To minimize the potential for blight by allowing previously conforming properties to maintain, repair, alter or replace existing development
 - To allow flexibility for compatible uses to continue and even in expand in limited cases
 - To remove uses that are detrimental to public health, safety, and welfare

- Previously conforming structures and uses are prevalent citywide:
 - The City has an extensive history of zoning code changes, including a major citywide rezone in 1997 that applied new zones citywide as part of the adoption of the original Land Development Code that took effect January 1, 2000.
 - Previously conforming situations continue to be created in association with the update process for land use plans, rezones, and amendments to the Land Development Code.

Proposed Changes

The proposed 9th Update would modify the existing previously conforming rules in the following ways:

- Requires a Process Two Neighborhood Development Permit for maintenance, repair, alteration or replacement of a previously conforming structure in the coastal zone that does not meet the coastal development permit exemption for repair and maintenance in Section 126.0704(b).
- Allows maintenance, repair, alteration or replacement of a structure containing previously conforming density through Process One, instead of requiring a Process Two Neighborhood Development Permit based on the market value of the improvements per the current code.
- Would change the threshold for discretionary permit review with respect to alteration or replacement of a structure containing a previously conforming use from market value to the removal of 50 percent or more of the structure's exterior walls.
- Allows for reconstruction of any previously conforming structure or use in accordance with Process One following a fire, natural disaster, or act of public enemy; and provides flexibility for minor modifications per the zone to be incorporated and approved with the reconstruction.
- Allows for limited expansion through a Process One for previously conforming multiple dwelling unit or non-residential development as necessary to comply with the Building Code or Fire Code.
- Allows for limited expansion through a Process Two Neighborhood Development Permit for structures with a previously conforming structural envelope or density where the proposed expansion meets specified criteria per Section 127.0106(b) in order to facilitate reasonable improvements per the zone, to maintain the character of existing development, and minimize potential impacts on surrounding development.
- Creates a new use category for eating and drinking establishments with a drive-in or drive-through component that will create greater certainty regarding the associated process, and will establish an amortization period for previously conforming hours of operation past midnight in neighborhood-commercial locations adjacent to residential (see also 9th Update Issue #27).
- Expands the existing allowance for expansion of previously conforming uses up to 20 percent via a Process Two Neighborhood Development Permit by allowing potentially compatible separately regulated uses to expand, and by clarifying the type of industrial development in residential zones considered detrimental to public health, safety, and welfare (no expansion allowed).

Previously Conforming Development Scenarios

The proposed changes address the most frequent conflict resolution issues that City staff faces in applying the current regulations. Property owners want to be able to make improvements and build back what they already have by right without the added expense or uncertainty of discretionary permit review. This was particularly a challenge when owners were looking to rebuild following the wildfires. It has also been a concern for owners who must demonstrate to financial lenders and insurance companies that the existing development can be improved or replaced. Following are details regarding applicability of the proposed regulations to various previously conforming scenarios:

Maintenance, Repair, Alteration, and Replacement

The goal is to continue to allow maintenance, repair, alteration, and replacement improvements to previously conforming structures via a staff level decision.

- Structures with a previously conforming structural envelope (where existing development was constructed lawfully, but due to a change in zoning, now exceeds the height, setbacks, or floor area ratio of the current zone) can be maintained, repaired, altered, or replaced in accordance with Process One consistent with the existing code. This means a previously conforming structure can be completely torn down and built back.
- Proposed changes will facilitate improvements to properties with previously conforming density by reducing the process to a staff level decision. Structures with previously conforming density (where an existing residential development was constructed with a lawful number of dwelling units, but due to a change in the zone or zoning regulations now has a greater number of dwelling units than is allowed by the zone) can be maintained, repaired, altered or replaced in accordance with Process One. This means any structure with previously conforming density can be completely torn down and built back.
- The permit process for structures with a previously conforming use (where an existing use was constructed lawfully, but due to a change in the zone or zoning regulations is no longer allowed by the zone) would be the same, but with a different calculation for the permit threshold. Structures with previously conforming uses can be maintained, repaired, altered or replaced in accordance with Process One if less than 50 percent of the exterior walls are removed. If 50 percent or more of the exterior walls are removed, then a Process Two Neighborhood Development Permit would be required. This means that the structure can be partially torn down to make improvements, but requires discretionary permit review for anything involving the removal of more than 50 percent of the structures exterior walls.
- Creation of a new separately regulated use category for eating and drinking establishments with a drive-through component will mean that type of development is treated as a “use” in the future (instead of what is currently regulated as a previously conforming design feature of a conforming use in zones where eating and drinking establishments are allowed by right). This means that previously conforming eating and drinking establishments with a drive-through component will now be subject to the previously conforming use regulations for future improvements.

Reconstruction (following fire, natural disaster, or act of public enemy)

The goal is to establish certainty in the process to reconstruct structures that have been destroyed. This is important for owners who need the ability to quickly rebuild following a fire, natural disaster, or act of public enemy.

- A structure with a previously conforming structural envelope, previously conforming density, or previously conforming use can generally be reconstructed in accordance with Process One.
- The associated permits for reconstruction can also include some minor changes per the zone via Process One as long as the new structure does not exceed the gross floor area or structure height of the destroyed structure by more than 10 percent and the new structure is sited in generally the same location as the destroyed structure. Any additional changes requested would require processing of a Process Two Neighborhood Development Permit.
- In the coastal zone, previously conforming rights are not retained for shoreline protective devices if 50 percent or more is destroyed.

Expansion or Enlargement

The goal is to provide limited expansion opportunities for potentially compatible development. By right approvals would continue to be allowed where in accordance with the current zone, or in narrowly defined circumstances to meet state law requirements. The proposal also expands on the parameters for small expansions via a discretionary permit, which will allow for small residential remodels to better integrate into existing development with a design that better respects the existing neighborhood development pattern (appealable permit). The existing discretionary permit provision only allows for a 1-2 foot extension beyond the existing setback line, which does not account for the context of the existing structure and does not contain the desired flexibility of a discretionary permit process.

- Expansion of a structure with a previously conforming structural envelope or previously conforming density where the proposed development complies with the current base zone requirements for structure height, setbacks and gross floor area can be approved in accordance with Process One consistent with the existing code.
- Expansion of a multiple dwelling unit or non-residential structure with a previously conforming structural envelope or previously conforming density is permitted in accordance with Process One as necessary to meet public safety requirements of the California Building Code or California Fire Code as long as the need per the California Building Code or Fire Code is not a situation created by the applicant due to the proposed expansion or enlargement.
- Expansion or enlargement of a structure with a previously conforming structural envelope or previously conforming density can be approved in accordance with a Neighborhood Development Permit where the proposed expansion complies with all of the specified criteria as follows:
 - Does not encroach into a front yard
 - Does not extend within 10 feet of the front yard setback line
 - Complies with floor area ratio and maximum structure height of base zone
 - Conforms to setback established by the existing structure
 - Does not exceed a maximum 15 foot length in any required side yard or rear yard
 - Would not result in a total structure length within the required yard that is greater than 50 percent of the length of the adjacent property line.
 - No expansion of the number of dwelling units is permitted beyond what is allowed per the underlying base zone.
- A previously conforming use can continue to request approval of a Process Two Neighborhood Development Permit to expand the gross floor area up to 20 percent consistent with the existing code.
- The current code contains limitations as to what types of previously conforming uses can apply for the 20 percent expansion via a discretionary permit, which was an issue raised during the Barrio Logan Community Plan Update. The 9th Update clarifies the types of industrial development in residential zones that are considered detrimental to public health, safety, and welfare and that would not be permitted to make application to expand. This will allow other potentially compatible separately regulated uses to request expansion up to 20 percent via a discretionary permit with required permit findings for approval that ensure the development will not be detrimental to public health, safety and welfare, will not adversely impact the land use plan, and otherwise conforms to the code.